

ENVIRONMENTAL PROTECTION COMMISSION[567]

Amended Notice of Intended Action

**Proposing rule making related to water quality certification requests
and providing an opportunity for public comment**

The Environmental Protection Commission (Commission) hereby proposes to amend Chapter 60, “Scope of Title—Definitions—Forms—Rules of Practice,” and Chapter 61, “Water Quality Standards,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is proposed under the authority provided in Iowa Code sections 455B.105 and 455B.173.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code sections 455B.105 and 455B.173.

Purpose and Summary

The proposed rule making is intended to streamline the process by which the Department of Natural Resources (Department) certifies that each United States Army Corps of Engineers (Corps) nationwide or regional Federal Water Pollution Control Act (the Act) Section 404 permit (Corps’s nationwide or regional permit), or other federal permit or license, meets Iowa’s water quality requirements. The proposed rule making achieves this by removing the requirement that the Department certify via rule making that each Corps’s nationwide or regional permit meets Iowa’s water quality requirements. Such certification is required by Section 401 of the Act, but certification via rule making is not. Certification by rule making is unnecessarily burdensome and can delay the applicability of the benefits of the Corps’s nationwide or regional permits to the regulated community. In addition, the rule making reorganizes and clarifies the list of potential conditions that may be included by the Department in state water quality certification of federal permits and licenses. This reorganization places the conditions together in one portion of the rule. Despite the removal of required rule making, the procedure for certifying the Corps’s federal permits will continue to provide opportunity for public comments.

Reason for Amendment of Notice of Intended Action

Notice of Intended Action for this rule making was published in the Iowa Administrative Bulletin on August 12, 2020, as **ARC 5134C**.

The Notice is being amended to align Section 401 water quality certification requests and certifications with changes to 40 CFR Part 121, which became effective September 11, 2020. These changes include substantive process changes as well as semantic changes. Specifically, the Commission is proposing the following additional changes: (1) a “prefiling meeting request” must be made 30 days before a certification request; (2) the decertification process proposed in the original Notice has been removed because the federal rules do not contemplate decertification; (3) all references to an “application” now refer to a “certification request”; and (4) all references to “water quality standards” now refer to “water quality requirements.” The new term “water quality requirement” is being added to the applicable list of definitions in rule 567—60.2(455B,17A). “Water quality requirement” is defined by reference to the corresponding federal definition.

Additionally, the proposed new subrule 61.2(6) includes two changes based on comments received during the original Notice’s comment period. One was from the Treated Lumber Council and the other was from the Iowa Environmental Council (IEC). In response to the comment by the IEC, this Amended

Notice clarifies the public notice and comment process. In response to the comment by the Treated Wood Council, this Amended Notice adds “treated lumber” to the list of possible permit conditions.

Finally, all references to the Corps have been replaced with a broader “federal agency” or “federal permits and licenses” to clarify that the rule is actually applicable to all federal permits and licenses that require state water quality certifications.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa. A copy of the fiscal impact statement is available from the Department upon request.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found. A copy of the jobs impact statement is available from the Department upon request.

Waivers

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Department for a waiver of the discretionary provisions, if any, pursuant to 561—Chapter 10.

Public Comment

Any interested person may submit written comments concerning this proposed rule making. Written comments in response to this rule making must be received by the Department no later than 4:30 p.m. on April 2, 2021. Comments should be directed to:

Iowa Department of Natural Resources
Attn: Section 401 Water Quality Certification
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319
Fax: 515.725.8201
Email: Section401WQC@dnr.iowa.gov

Public Hearing

A public hearing at which persons may present their views orally will be held via conference call as follows. Persons who wish to attend the conference call should contact Katie Greenstein via email at katie.greenstein@dnr.iowa.gov. A conference call number will be provided prior to the hearing. Persons who wish to make oral comments at the conference call public hearing must submit a request to Dr. Greenstein prior to the hearing to facilitate an orderly hearing.

March 30, 2021
3 to 4 p.m.

Via video/conference call

Persons who wish to make oral comments at the public hearing will be asked to state their names for the record and to confine their remarks to the subject of this proposed rule making.

Any persons who intend to attend the hearing and have special requirements, such as those related to hearing or mobility impairments, should contact the Department and advise of specific needs.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or

group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making actions are proposed:

ITEM 1. Adopt the following new definition of "Water quality requirement" in rule **567—60.2(455B)**:

"Water quality requirement" means the same as defined in 40 CFR §121.1(n).

ITEM 2. Amend paragraph **61.2(2)"g"** as follows:

g. This policy shall be applied in conjunction with water quality certification review pursuant to Section 401 of the Act. In the event that activities are specifically exempted from flood plain development permits or any other permits issued by this department in 567—Chapters 70, 71, and 72, the activity will be considered consistent with this policy. Other activities not otherwise exempted will be subject to 567—Chapters 70, 71, and 72 and this policy. ~~United States Army Corps of Engineers (Corps) nationwide permits 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, and 52 as well as Corps regional permits 7, 27, 33, and 34 as revised through July 16, 2014, are certified pursuant to Section 401 of the Clean Water Act subject to the following Corps regional conditions and the state water quality conditions:~~

~~(1) Side slopes of a newly constructed channel will be no steeper than 2:1 and planted to permanent, perennial, native vegetation if not armored.~~

~~(2) Nationwide permits with mitigation may require recording of the nationwide permit and pertinent drawings with the registrar of deeds or other appropriate official charged with the responsibility for maintaining records of title to, or interest in, real property and may also require the permittee to provide proof of that recording to the Corps.~~

~~(3) Mitigation shall be scheduled prior to, or concurrent with, the discharge of dredged or fill material into waters of the United States.~~

~~(4) For newly constructed channels through areas that are unvegetated, native grass filter strips, or a riparian buffer with native trees or shrubs a minimum of 35 feet wide from the top of the bank must be planted along both sides of the new channel. A survival rate of 80 percent of desirable species shall be achieved within three years of establishment of the buffer strip.~~

~~(5) For single family residences authorized under nationwide permit 29, the permanent loss of waters of the United States (including jurisdictional wetlands) must not exceed 1/4 acre.~~

~~(6) For nationwide permit 46, the discharge of dredged or fill material into ditches that would sever the jurisdiction of an upstream water of the United States from a downstream water of the United States is not allowed.~~

~~(7) For projects that impact an outstanding national resource water, outstanding Iowa water, fens, bogs, seeps, or sedge meadows, an individual Section 401 Water Quality Certification will be required (Iowa Section 401 Water Quality Certification condition).~~

~~(8) For nationwide permits when the Corps' district engineer has issued a waiver to allow the permittee to exceed the limits of the nationwide permit, an individual Section 401 Water Quality Certification will be required (Iowa Section 401 Water Quality Certification condition).~~

~~(9) Heavy equipment shall not be used or operated within the stream channel. If in-stream work is unavoidable, it shall be performed in such a manner as to minimize the duration of the disturbance, turbidity increases, substrate disturbance, bank disturbance, and disturbance to riparian vegetation. This condition does not further restrict otherwise authorized drainage ditch maintenance activities (Iowa Section 401 Water Quality Certification condition).~~

Written verification by the Corps or 401 certification by the state is required for activities covered by these permits as required by the nationwide permits or the Corps, and the activities are allowed subject to the terms and conditions of the nationwide and regional permits. The department will maintain and periodically update a guidance document listing special waters of concern. This document will be provided to the Corps for use in determining whether preconstruction notices should be provided to the

~~department and other interested parties prior to taking action on applications for projects that would normally be covered by a nationwide or regional permit and not require a preconstruction notice under nationwide permit conditions.~~

ITEM 3. Adopt the following **new** subrule 61.2(6):

61.2(6) State water quality certification. This subrule describes the procedures the department will follow when processing certification requests for state water quality certification (certification) of federally issued licenses and permits pursuant to Section 401 of the Act, including but not limited to permits issued by the United States Corps of Engineers (Corps) pursuant to Section 404 of the Act.

a. General. The department shall receive, consider, and process certification requests in accordance with Section 401 of the Act.

b. Certification requests. Certification requests shall be made on the department's Section 401 Water Quality Certification Request form. This form is available on the department's website. Individual permits or licenses issued by federal agencies require submission of a prefiling meeting request and certification request to obtain certification. The prefiling meeting request must be submitted to the department at least 30 days prior to submitting the certification request.

c. Public notice. The department shall issue a public notice of a certification request. The public notice may be a joint public notice issued by a federal agency on behalf of the department. When there is no joint public notice issued by the federal agency, a public notice issued by the department will be provided on its website. The public notice shall solicit comments from the public regarding whether the proposed project complies with state water quality requirements in accordance with Section 401 of the Act. The public notice shall specify the procedure and time frame for submitting comments on the proposed project.

d. Public notice for new or renewed nationwide or regional permits. The department shall provide additional notice to the public of certification of new or renewed nationwide or regional permits issued by the Corps pursuant to Section 404 of the Act. The department shall provide such notice on its website. The public notice shall solicit comments from the public regarding whether the proposed permit complies with state water quality requirements in accordance with Section 401 of the Act. The public notice shall specify the procedure and time frame for submitting comments on the proposed certification.

e. Department action on certification request. After the close of the public comment period and consideration of comments received, the department may issue a certification letter which may include conditions necessary to ensure compliance with state water quality requirements, waive issuance of the certification, or deny certification in accordance with Section 401 of the Act.

f. Certification of federal permits or licenses may require conditions, which may include one or more of the following, to ensure water quality requirements are met:

(1) During construction and upon completion of the project, actions must be taken to prevent pollution affecting public health, fish, shellfish, wildlife, and recreation due to turbidity, pH, nutrients, suspended solids, floating debris, visible oil and grease, or other pollutants entering waters of the state;

(2) Equipment used in waters of the state shall be cleaned of all hazardous materials, pesticides, fuels, lubricants, oils, hydraulic fluids, or other construction-related, potentially hazardous substances before arriving on site. Wash water shall not be discharged into a water of the state;

(3) All cleared vegetative material shall be properly managed in such a manner that it cannot enter a water of the state and cause a violation of water quality requirements;

(4) All construction debris shall be properly managed in such a manner that it cannot enter a water of the state;

(5) Erosion shall be managed so that sediment is not discharged to a water of the state in a manner that causes a violation of water quality requirements;

(6) Riprap, treated lumber products, and temporary structures shall consist of clean material free of coatings of potentially hazardous substances. No asphalt or petroleum-based material shall be used as or included in material placed in any water of the state or within the high-water table;

(7) Stockpiled dredged materials on the shore shall be managed so that sediment is not discharged in a manner that causes a violation of water quality requirements;

(8) Water quality monitoring will be required for Federal Energy Regulatory Commission hydropower projects at the baseline, construction and operational phases of the project;

(9) Hydraulically dredged material shall be managed to ensure the return water meets water quality requirements.

g. Duration of certification. The department's certification shall remain in effect until the expiration date of the applicable permit or license.